Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

DONALD NEAL RAKE, LINDA JEAN RAKE, EARNEST WILLIAM YELL, AND MARY KATHRYN YELL,
Petitioners,

v.

WILLIAM J. WADE, TRUSTEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October 16, 1992

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STATEMENT OF THE CASE

Respondent clarifies the facts set forth in the Petition by stating that in each case the mortgage in question constitutes a first lien upon the principal residence of the Debtor(s), is one termed oversecured, and in each case there was approval of the secured claim of the Respondent. No other property other than the principal

residence of the Debtor(s) was taken as security. The reason for this clarification is to bring the issues clearly within the contemplation of 11 U.S.C.S. § 1322(b)2 and the serious question of "modification."

Further, in each case. the "allowed secured claim" of Respondent included not only payment arrearage but attorney fees and court costs as well. This clarification is necessary to bring the matter in line with 11 U.S.C.S. § 506(b) and the language, "such claim."

SUMMARY OF THE ARGUMENT

There remains confusion amongst the courts over the import and meaning of *Dewsnup* and *Ron Pair*.

This court must conceptualize the terms "modify" and "cure" in order to effectuate the intent of Congress and protect the constitutional property rights of home mortgage lenders.

ARGUMENT

There remains confusion amongst the courts over the import and meaning of *Dewsnup* and *Ron Pair*.

There is no denial of the allegation there is hopeless conflict between the circuits on the point appealed from; there is no denial there is need for clarification of the terms "modify" and "cure." Since this Court's pronouncement of *Dewsnup v Timm*, 112 S. Ct. 773 (1992), there continues conflict in Chapter 13 cases over the impermissible modification of home mortgages by the

courts through misinterpretation of *Dewsnup*, such that half the courts are applying the doctrine as justification for bifurcation of home mortgages and the other half holding that bifurcation is not allowed. For case holding bifurcation is impermissible see *Matter of Nobelman*, 968 F.2d 483 (5th CA 1992) which notes therein that four circuits have adopted the position allowing modification by bifurcation of an under secured mortgage into a secured portion and an unsecured portion. See *Bellamy v Fed. Home Loan Mtg.*, 962 F.2d 176, 179-180 (2nd CA 1992). The Tenth Circuit, from whence *Dewsnup* had its origin, allows bifurcation. See *In re Hart*, 923 F.2d 1410, 1411 (10th CA 1991). Lower courts in Oklahoma are totally divided with some following *Dewsnup* in a Chapter 13 milieu and others following the Tenth Circuit view.

Therefore, it is apparent that much violence is being done to the Congressional intent of § 1322(b)2 in protecting the home mortgage market through confusion between the terms "modify" and "cure." Although bifurcation is not a point in contention for review here, it would be injudicious for the Court not to include a sage clarification of those terms in that context as well.

This court must conceptualize the terms "modify" and "cure" in order to effectuate the intent of Congress and protect the Constitutional property rights of home mortgage lenders.

This appeal is of significant importance in view of the prevalence of home mortgages and their socio-

economic importance and in view of the record breaking increase of Chapter 13 filings. After *U. S. v Ron Pair Enterprises, Inc.,* 109 S. Ct. 1026 (1989) and *Dewsnup*, it is very surprising that there exists any confusion at all, and the only observation that is apt is that whatever equity remains in the Bankruptcy Courts, they certainly follow equity rather than "equity follows the law."

Any examination of the power of the Bankruptcy Courts to modify a mortgagee's property rights must begin with *Radford v Louisville Joint Stock Land Bank*, 295 U.S. 555 (1935). This Court in *Dewsnup* significantly relied upon that case to establish that under the Taking Clause, a court may not deprive the mortgagee of his property rights in absence of full payment of his bargain.

Part of the bargain taken as part of the lien in a mortgage transaction is the right to add charges to the mortgage for insurance and taxes advanced, attorney fees and costs incurred as a result of default. The battle lines become drawn where a mortgagor defaults, allows arrearages to accumulate, including insurance and delinquent taxes paid for by the mortgagee to protect his property rights, and at the eleventh hour before a sheriff's sale, be faced with a Chapter 13 filing. A secured claim is allowed, but the commonly proposed Chapter 13 plan takes two paths: one is to reduce the debt to the mortgagee by bifurcating his claim into secured and unsecured portions and paying cents on the dollar upon the unsecured portion. The other path is to deny the mortgagee interest upon the forced loan that is made in payment of the secured portion in the plan. In spite of

the provisions of § 1325(a)5(B), the majority of the courts see no wrong in denying interest to the mortgagee which was intended to account for the diminishing value of money repaid over the term of the plan; they see no wrong in bifurcating the mortgagee's property rights and further devaluing the bargain of the mortgage debt.

It is apparent, therefore, that central to the argument is the proper conceptualization of the words "cure" and "modify." The House Report for the 1978 Bankruptcy Code explains § 1322(b)2 by referring separately to a debtor's power to "modify" a claim and the debtor's power to "cure" a default. It is clear from a reading of the Congressional intent and the statute, that "cure" means something different from "modify."

If *Radford* is to continue to have any meaning, it is clear the home mortgage lender is entitled to full payment of arrearages as well as timely payment of subsequent payments due under the mortgage.

This right is assured by § 1325(a)5(B)ii which mandates that a Chapter 13 plan must provide for time-value interest on an "allowed secured claim" that is to be satisfied over the life of the plan; otherwise, the claim would be less than the "allowed secured claim." Anything less would contravene the "no modification rule" contained in § 1322(b)2.

Those circuits which deny interest where there is no provision in the loan documents for default interest totally ignore the import and mandate of § 1325(a)5(B)ii. The Tenth Circuit, following the Sixth Circuit, correctly

allows time-value interest despite absence of such a provision simply because they, as this Court, have read § 506(b) and *Ron Pair* in its true context.

With the realization that home mortgages cannot be reduced under a Chapter 13 plan, the only allowed secured claim is its full, unmodified claim. Time-value interest preserves the full value (the allowed secured claim) of home mortgages arrearages not paid immediately.

CONCLUSION

The office of this response is to assist the Court in its exercise of discretionary jurisdiction. With the above demonstrated judicial confusion extant over the words "modify" and "cure," it would be lamentable if this choice opportunity were not taken for this Court to cure the transgressions that are rift in the lower courts in denying interest and in bifurcating claims in order to reduce mortgage debt in lieu of the Constitutional right to full payment.

The favored treatment of home mortgage lenders is based upon the public policy choice of Congress to not modify the rights of home mortgage lenders because of the concern that home mortgage lending would diminish if the claims of home mortgage lenders were reduced in bankruptcy. Congress, in light of the tremendous socio-economic importance of home ownership, struck a balance such that financially troubled home owners are able to forestall foreclosure and repay arrearages over a time

while at the same time allowing home mortgage lenders the full amount of their claims.

The Respondent therefore joins in the prayer that this Court take jurisdiction of this dispute and affirm the holding of the Tenth Circuit and define for the lower courts the true meaning of the words "cure" and "modify."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing instrument to Harvey C. Carpenter on the 14th day of October by U.S. Mail, first class, postage prepaid.

Lawrence A. G. Johnson